

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., et al.,

Plaintiffs,

- against -

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

DISCOVER PROPERTY & CASUALTY
COMPANY, et al.,

Plaintiffs,

- against -

NATIONAL FOOTBALL LEAGUE, et al.,

Defendants.

Index No. 652813/2012 E
Hon. Andrea Masley

Mot. Seq. 022

Index No. 652933/2012 E
Hon. Andrea Masley

Mot. Seq. 023

**NATIONAL FOOTBALL LEAGUE AND NFL PROPERTIES LLC'S MEMORANDUM
OF LAW IN SUPPORT OF NON-PARTY TEAMS' MOTION FOR A PROTECTIVE
ORDER REGARDING INSURERS' SUBPOENAS OF NON-PARTY TEAMS**

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Defendants the National Football League (“NFL”) and NFL Properties LLC (“NFLP”) (together, “NFL/NFLP”) respond to the Non-Party Teams’ (“Teams”) motion for a protective order and, pursuant to this Court’s orders dated April 29, 2019, respectfully submit this memorandum of law in support.

PRELIMINARY STATEMENT

This Court is the most efficient and appropriate forum in which to resolve disputes about the insurers’ subpoenas of the third-party Teams. This Court is adjudicating the insurance coverage action between the NFL/NFLP and the insurance companies that is the premise for the subpoenas. This Court has jurisdiction over the parties—*i.e.*, the NFL, NFLP, and their insurers. The non-party Teams have now stipulated that they submit to this Court’s jurisdiction to rule on any disputes regarding their objections to the subpoenas, so any meaningful reason not to resolve those issues in this Court has been eliminated. It would be wasteful and burdensome to require the parties and the Teams to litigate repeatedly, in dozens of other courts throughout the country, the same issues regarding each of the nearly identical subpoenas.

BACKGROUND

A. The Coverage Litigation Between the NFL/NFLP and Their Insurers

This is an insurance coverage action between the NFL, NFLP, and their insurers. There are *no claims* in this case asserted by or against the Teams. The insurance policies in this action were issued by the insurers to the NFL and NFLP, not to the Teams. The dispute concerns insurance coverage for concussion-related tort lawsuits brought by former professional football players against the NFL and NFLP, not the Teams. *See generally, e.g., In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 361 (E.D. Pa. 2015) (the “MDL Action”). Those tort lawsuits are premised on alleged conduct by the NFL and NFLP, not the Teams. *See id.* at 362. The insurers’ arguments to avoid coverage are premised on their

allegations concerning the knowledge, intentions, and conduct of the NFL and NFLP—not the Teams. While the Teams are members of the NFL and stakeholders in NFLP, the NFL and NFLP alone are the defendants in the tort cases for which coverage is sought and that coverage is sought only under insurance policies issued to the NFL and NFLP, not the Teams. Accordingly, the Teams are and should be treated as third parties when considering the burden and proportionality of the discovery being sought.¹

The insurers initiated these coverage actions here in New York. At the outset of this case, the insurers successfully sought to stay coverage litigation proceedings elsewhere based in part on their assertions that various non-parties “may be relevant sources of discoverable information in this dispute and would be subject to the New York court’s subpoena power.” Cho Aff. Ex. A at 8. The insurers further argued, successfully, that other courts “should not be burdened with deciding an action for which they have little or no concern.” *Id.* at 12. Since then, all litigation in connection with this dispute between the NFL/NFLP and their insurers has been before this Court and, with respect to discovery issues, the appointed Special Referee—until the insurers began filing motions to compel against Teams in other jurisdictions in April 2019 without notice.

B. The Insurers’ Subpoenas of the Non-Party Teams

Over the course of a year, from August 2017 to August 2018, the insurers in this action served a series of largely identical subpoenas against the Teams seeking very broad discovery. See Schafler Aff. of Irreparable Harm ¶¶ 11–12 (“Schafler Aff.”)²; *see also, e.g.*, Schafler Aff.

¹ A few lawsuits in the MDL named certain teams and not NFL/NFLP. The NFL/NFLP are not seeking coverage for those lawsuits.

² Index No. 652813/2012, Doc. No. 539; Index No. 652933/2012, Doc. No. 543.

Ex. A at 4 ¶ 11 (subpoena of Buffalo Bills) (demanding production of “[a]ll lists, databases, compilations, or spreadsheets maintained by the Bills containing data about current or former players of the Bills, including but not limited to name, date of birth, dates of NFL career, documented concussions, and Alleged Brain Injuries sustained, or any similar information”).³ The subpoenas also sought documents that the insurers had already requested from the NFL/NFLP and which were the subject of discovery disputes before this Court including, among other things, all communications between the NFL/NFLP and the Teams regarding brain injuries, documents concerning NFL player lawsuits involving brain injuries, and agreements between the NFL/NFLP and the Teams. *See id.* ¶ 12. The subpoenas specifically demanded that the Teams produce all of the NFL and NFLP’s communications with the Teams “regarding strategy for the defense of the MDL Action.” *See, e.g.*, Schafler Aff. Ex. A at 5 ¶ 24 (subpoena of Buffalo Bills).

From August 2018 through January 2019, the NFL/NFLP and the insurers briefed, argued, and filed supplemental briefs on five motions before the Special Referee regarding the parties’ discovery obligations. The Teams, as non-parties, were not involved. On February 28, 2019, the Special Referee in this case issued a written opinion that granted in part and denied in part the insurers’ and the NFL/NFLP’s motions to compel discovery from each other, as well as the NFL/NFLP’s motion for a protective order.⁴

³ Index No. 652813/2012, Doc. No. 540; Index No. 652933/2012, Doc. No. 544.

⁴ *See* Index No. 652813/2012, Doc. No. 509; Index No. 652933/2012, Doc. No. 517.

On April 5, 2019, the insurers moved this Court for review of the Special Referee's decision.⁵ That same day, and without prior notice to the Teams or the NFL or NFLP, the insurers began filing motions to compel in foreign jurisdictions against each of the Teams. *See Schafler Aff.* ¶ 23. Those nearly identical motions sought to compel the Teams to produce everything requested by the insurers' subpoenas. *See, e.g., id.* ¶ 25.

On April 26, 2019, the Teams moved this Court for a protective order directing the insurers to withdraw or stay the proceedings they commenced in other jurisdictions, and for a temporary restraining order. *See id.* ¶¶ 2–3. The Teams stipulated that they would submit to this Court's jurisdiction to resolve their objections to the subpoenas.⁶ On April 29, 2019, this Court heard arguments regarding the temporary restraining order and, on consent, ordered the insurers to temporarily restrain from commencing or continuing to prosecute any proceedings in other jurisdictions against the Teams to compel compliance with the subpoenas, and ordered the Teams to search for and produce certain documents to which the Teams did not object.⁷ With respect to the Teams' motion for a protective order, the Court set a briefing schedule and permitted the NFL and NFLP to file a memorandum of law.

STANDARD

"It is well-settled that the trial court is vested with broad discretion in supervising pre-trial discovery." *Farrakhan v. N.Y.P. Holdings, Inc.*, 226 A.D.2d 133, 135 (1st Dep't 1996); *see also, e.g., Church & Dwight Co. v. UDDO & Assocs.*, 159 A.D.2d 275, 276 (1st Dep't 1990) ("[T]he Court may use sound discretion to regulate and prevent abuse of the discovery process

⁵ See Index No. 652813/2012, Doc. No. 471, at 2; Index. No. 652933/2012, Doc. No. 479, at 2.

⁶ See Index No. 652813/2012, Doc. No. 546, at 3; Index No. 652933/2012, Doc. No. 550, at 3.

⁷ See Index No. 652813/2012, Doc. No. 545; Index No. 652933/2012, Doc. No. 549.

by protective orders. . . . CPLR 3103(a) is designed to give the court broad discretion.”). In addition, “[t]he court has broad discretion to fashion an appropriate remedy” in a protective order. *Jones v. Maples*, 257 A.D.2d 53, 56 (1st Dep’t 1999). *See generally Lipin v. Bender*, 84 N.Y.2d 562, 571–72 (1994) (“Spelling out the remedies for the limitless potential discovery abuses would not only overwhelm the statute but also needlessly confine the discretion of courts to tailor the remedy to the problem. . . . As the drafters made clear, ‘[t]here is no limit but the needs of the parties on the nature of the [protective] order or the conditions of discovery.’”).

ARGUMENT

The Court should enjoin the insurers from continuing to pursue duplicative, wasteful, and burdensome proceedings against the Teams in other jurisdictions, now that the Teams have submitted to this Court’s jurisdiction for relevant purposes. The insurers should not be permitted to force the NFL and NFLP potentially to intervene in each of those actions to protect their rights with respect to issues that have already been or may in the future be decided by this Court.

Where, as here, a subpoenaed non-party has agreed to submit its objections to the court with jurisdiction over the underlying case, “It is appropriate for the . . . court which has the underlying case, and is therefore in a better position to determine the appropriate scope of disclosure, to make the threshold determination as to whether to permit the discovery.” *In re Kerr*, 16 Misc. 3d 1028, 1032 (Sup. Ct., N.Y. Cty. 2007) (quoting *In re Welch*, 183 Misc. 2d 890, 891 (Sup. Ct., N.Y. Cty. 2000)) (brackets omitted); *see also In re Land*, 22 Misc. 3d 1117(A), No. 100796/08, 2009 WL 241728, at *5 (Sup. Ct., N.Y. Cty. 2009) (same).

This principle is consistent with common sense. “It makes abundant sense . . . that the [underlying case’s] court—familiar with and responsible for the underlying action—make the decision at the very outset,” instead of courts in foreign jurisdictions. *Kerr*, 16 Misc. 3d at 1032. There is no legitimate reason for the insurers to seek to avoid having the Teams’ subpoena

objections resolved by this Court. To the extent that the insurers' purpose may be to inflict greater litigation costs on the Teams and the NFL/NFLP, or to seek an alternative forum that is "less familiar with the [underlying] action and any applicable [New York] law," those illegitimate purposes would "exemplif[y] procedural game playing at its worst." *Id.* at 1031–32.

Courts in other jurisdictions may expect that before this Court authorizes the insurers to prosecute foreign actions against non-parties to compel discovery, this Court will have considered and properly limited the scope of such discovery as appropriate for the underlying case. *Cf., e.g., In re Ayliffe & Cos.*, 166 A.D.2d 223, 224 (1st Dep't 1990) (holding that a non-party's arguments regarding the necessity of certain subpoenaed testimony "would be more appropriately addressed to the [underlying case's] court"); *Kerr*, 16 Misc. 3d at 1032; *In re Land*, 22 Misc. 3d 1117(A), 2009 WL 241728, at *5; *Fischer Brewing Co. v. Flax*, 740 N.E.2d 351, 354 (Ohio Ct. App. 2000), *abrogation in part recognized in DeSalle v. Wal-Mart Stores Inc.*, 70 N.E.3d 185, 190 n.2 (Ohio Ct. App. 2016). Although "the discovery state has a significant interest in protecting its residents who become non-party witnesses in an action pending in another jurisdiction from unreasonable or burdensome discovery requests,"⁸ that interest is not implicated where, as here, the non-parties have agreed to submit the issue to the court with the underlying case. By contrast, the foreign states in which the non-parties reside do not have an interest in expanding discovery in this case for the insurer parties beyond what this Court concludes is appropriate. Foreign states' consent to provide discovery in aid of New York litigation "is rooted in principles of comity," *Am. Online, Inc. v. Anonymous Publicly Traded*

⁸ Mem. in Support, Bill Jacket, S. 4256, ch. 29, at 5 (Apr. 20, 2009), available at <https://www.nysenate.gov/legislation/bills/2009/s4256/amendment/original>.

Co., 542 S.E.2d 377, 382 (Va. 2001), and it would abuse the principle of comity for the insurers to require numerous courts throughout the country to needlessly decide duplicative issues in service of a New York case.

This Court has the authority to grant the requested relief. Under CPLR 3103, the Court has broad discretion to issue protective orders regarding discovery in the above-captioned actions, which the parties must obey. To be clear, the Teams have not asked this Court to compel any court in any other jurisdiction to do anything. The Teams' motion properly asks this Court to issue an order governing the conduct of the insurers, as parties in this case, regarding discovery in this case.

CONCLUSION

For the foregoing reasons, the Court should grant the Teams' motion for a protective order.

Respectfully submitted,

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